No. 79-1624

In The

Supreme Court of the United States

October Term, 1979

LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

DONN PRODUCTS, INC., and AMERICAN METALS CORP.,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DONN PRODUCTS, INC. AND AMERICAN METALS CORP. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Questions Presented 2

Statement of the Case 2

Reasons for Denying the Petition 5

I. The decision of the court of appeals neither conflicts with any decision of this Court or any court of appeals, nor involves any important but unsettled question of federal law 5

II. The decision below was correct in denying enforcement of the bargaining order 11

Conclusion 13

Addendum:

Letter, March 27, 1980, National Labor Relations Board to Counsel for Other Parties 14

TABLE OF AUTHORITIES

Cases

Armcor Industries, Inc., 227 N.L.R.B. 1543 (1977), *enf. denied on other grounds*, ... F.2d ....., 98 LRRM 2441, No. 77-1495 (3rd Cir. 1978) 8

First Lakewood Associates v. N.L.R.B., 582 F.2d 416 (7th Cir. 1978) 11

Gold Circle Department Stores, 207 N.L.R.B. 1005 (1973) 6

The May Department Stores Company, 211 N.L.R.B. 150 (1974) 6

N.L.R.B. v. Appletree Chevrolet, Inc., 608 F.2d 988 (4th Cir. 1979) 6
N.L.R.B. v. Armcor Industries, Inc., 535 F.2d 239 (3rd Cir. 1976) 6, 11
N.L.R.B. v. General Stencils, Inc., 472 F.2d 170 (2nd Cir. 1972) 6
N.L.R.B. v. Gibson Products Co. of Washington Parish, La., Inc., 494 F.2d 762 (5th Cir. 1974) 6
N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969) 7, 9, 11
N.L.R.B. v. Jamaica Towing, Inc., 602 F.2d 1100 (2nd Cir. 1979) 6, 11
N.L.R.B. v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1977) 6
N.L.R.B. v. Pilgrim Foods, Inc., 591 F.2d 110 (1st Cir. 1978) 6, 11
N.L.R.B. v. World Carpets of New York, Inc., 463 F.2d 57 (2nd Cir. 1972) 6
Peerless of America v. N.L.R.B., 484 F.2d 1108 (7th Cir. 1973) 6
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 9

Statutes

29 U.S.C. §158(a)(1), Labor Management Relations Act of 1947, as amended, §8(a)(1) 3, 9, 10

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Donn Products, Inc. and American Metals Corp., respondents herein (the "Company"), submit that this Court should not grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") in this case.

QUESTIONS PRESENTED

The "Questions Presented" in the Petition of Local 450, United Furniture Workers of America AFL-CIO (the "Union") are not fairly expressed in the actual terms and circumstances of the case. Accordingly, the Company contends that the following restatements of questions one and two are more proper.

1. In determining whether to enforce an order of the National Labor Relations Board (the "Board") requiring an employer to bargain with a union that lost an election allegedly because of employer unfair labor practices, should a court of appeals consider the failure of the Board to find, based on substantial evidence in the record, that the unfair labor practices either, had any continuing impact or were likely to be repeated?

2. In determining whether to affirm a finding of the Board that an employer, in a speech to employees, had threatened to refuse to bargain, should a court of appeals review the entire speech as it appears in the record, or is it limited to a consideration of only those isolated excerpts from the speech relied upon by the Board?

STATEMENT OF THE CASE

Beginning in March, 1975, the Union conducted an organizing campaign among employees of the Company. On July 9, 1975, the Union claimed that it had acquired authorization cards from a majority of employees. An election was held on September 10, 1975 pursuant to a petition filed by the Union with the Board. The Union lost the election by a vote of 148 "no" to 115 "yes."

The Union thereafter filed unfair labor practice charges, and also filed objections to conduct affecting the results of the election. The two proceedings were consolidated and a complaint was issued by the Board. Following a hearing in July and August, 1976, Administrative Law Judge Thomas Ricci (the "ALJ") issued a Decision and Recommended Order on October 18, 1976, finding the Company to have committed certain unfair labor practices in violation of §8(a)(1) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §158(a)(1) (the "Act"), which he characterized as "minor," and ordering a new election.

All parties excepted to the ALJ's decision. The Board reviewed it and issued its Order on April 20, 1977, affirming the ALJ with the exception of finding an additional §8(a)(1) violation and ordering the Company to bargain with the Union, 229 N.L.R.B. 116 (1977). The Company petitioned for review of the Board's Order in the United States Court of Appeals for the Sixth Circuit, and the Board cross-petitioned for enforcement of its Order.

On January 17, 1980, the court of appeals entered its judgment denying enforcement to those portions of the Board's Order relating to the additional §8(a)(1) violation found by the Board and to the order to bargain, 613 F.2d 162 (6th Cir. 1980).

The representation campaign that led to this litigation was vigorously conducted by both sides. While the vast bulk of the campaign materials and methods of the Company either was of unchallenged legality or was found to have been proper, certain unfair labor practices were found.

Although the Company continues to contend that none of its acts constituted unfair labor practices, it is also

the position of the Company that even if, *arguendo,* some of its conduct amounted to a technical violation of the Act, that conduct was not of a nature sufficient to undermine the Union's support. Thus, among the unfair labor practices focused upon by the Board, several occurred *before* the Union achieved its asserted majority status.* All but one of the others consisted of statements that were not on their face promises of benefits or threats, but were implied to be so by the Board. None were shown to have had any effect on support for the Union, and none were shown to have had any continuing effect.

As already stated, the Company contends that it has not committed any unfair labor practices, but, in the interest of having an end to litigation, it has complied with the Board's Order as enforced by the court of appeals. The benefits found to have been unlawfully granted are no longer in effect and the required notice has been posted at the request of the Board. The Board, for its part, although it has been on the opposite side of the case from the Company throughout this litigation, and is the party most affected by the questions raised in the Petition, has also accepted the judgment of the court of appeals.

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*Contrary to the Union's representation in the Petition (Petition 9), the arbitration provision that was added to a preexisting grievance procedure went into effect immediately upon its announcement in June, 1975 (A-45). [References are to pages of the Petition or the Appendix to the Petition.]

REASONS FOR DENYING THE PETITION

I THE DECISION OF THE COURT OF APPEALS NEITHER CONFLICTS WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS, NOR INVOLVES ANY IMPORTANT BUT UNSETTLED QUESTION OF FEDERAL LAW

The first "Question Presented" by the Union sets up an "issue" that is not fairly present in this case. Thus, contrary to the premise for the Union's first question, the court of appeals did not hold that a bargaining order was not warranted "simply because the Company discontinued its illegal activity" (Petition 3). What the court found was that the record did not establish a need for a bargaining order in the face of the rejection of the Union by the Company's employees in the election and that the Board had failed in its obligation to base its conclusory statements on findings supportable on the record.

In the words of the court:

> There is nothing in the record to indicate that any of the violations are of a continuing nature. . . . The Board made no findings or detailed analysis as to the residual impact or continuing effect, or the likelihood of recurrence, of any of the unfair labor practices. . . . While we are required to respect the special expertise of the Board, particularly in the formulation of remedies, courts are not required to enforce bargaining orders based on conclusory statements unsupported by sufficient facts. . . .
>
> Our study of the entire record convinces the court that this was not a proper case for a bargaining

> order. There was a hard-fought campaign, but the classic tactics of discharge and widespread discrimination against and harassment of union sympathizers were not present. . . . The unfair labor practices which occurred were of a kind whose effect would quickly dissipate. (Citations and certain other statements omitted) (A-7, 8).

Since the Board itself has held that such factors as the continuing nature of violations and their susceptibility to correction by traditional remedies are important for deciding the appropriateness of a bargaining order, *Gold Circle Department Stores*, 207 N.L.R.B. 1005 (1973), *The May Department Stores Company*, 211 N.L.R.B. 150, 152 (1974), the court's focus upon those factors presents no question of importance to the relationship between the Board and the reviewing courts of appeals. Further, every court of appeals that has considered the matter has held that such factors are relevant, that the Board has a duty to analyze them, and that, if the Board fails to discharge this duty, its unsupported conclusions cannot be the basis for an enforceable order. *See, e.g., N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *N.L.R.B. v. World Carpets of New York, Inc.*, 463 F.2d 57, 62 n.6 (2nd Cir. 1972); *N.L.R.B. v. General Stencils, Inc.*, 472 F.2d 170, 174 (2nd Cir. 1972); *N.L.R.B. v. Jamaica Towing, Inc.*, 602 F.2d 1100, 1103-1104 (2nd Cir. 1979); *N.L.R.B. v. Armcor Industries, Inc.*, 535 F.2d 239, 244-45 (3rd Cir. 1976); *N.L.R.B. v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 997 (4th Cir. 1979); *N.L.R.B. v. Gibson Products Co. of Washington Parish, La., Inc.*, 494 F.2d 762, 766-67 (5th Cir. 1974); *Peerless of America v. N.L.R.B.*, 484 F.2d 1108, 1118 (7th Cir. 1973); *N.L.R.B. v. Pacific Southwest Airlines*, 550 F.2d 1148, 1151-52 (9th Cir. 1977). Thus, there is no conflict among the circuits, and there really could not be, since

this Court has already specifically affirmed that those precise factors considered by the court of appeals but ignored by the Board in this case are to be weighed by the Board:

> In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

N.L.R.B. v. Gissell Packing Co., 395 U.S. 575 at 614-615 (1969).

The Union's suggestion that the court of appeals in this case determined the possibility of a fair rerun election as of the date of the decision by the court of appeals is not supported by the record. Indeed, the court specifically found that "[T]he unfair labor practices which occurred were of the kind whose effect would quickly dissipate." (A-8). The Union argues that the Board itself looks to the seriousness of the unfair labor practices as of the time they were committed in fashioning its remedy, but this is contrary to established Board precedent.

> [I]n our view the validity of a bargaining order in this case and in similar cases should properly rest upon our analysis of the seriousness and pervasiveness of the unlawful conduct at the time that conduct was first presented for our scrutiny. . . .

Armcor Industries, Inc., 227 N.L.R.B. 1543, 1545 (1977), *enf. denied on other grounds,* ..... F.2d ....., 98 LRRM 2441, No. 77-1495 (3rd Cir. 1978). In the present case, the Board failed to discharge its duty by neglecting to assess the impact at any time.

The record contains many examples of how the Board did not properly consider the impact of the unfair labor practices on the Union's asserted majority status or on the possibility for a fair rerun election. Thus, whereas the Board relied heavily upon the alleged threats to and interrogation of two employees, those "threats" were made only in one-on-one contacts, were never publicized to any other employees, did not affect the continued activism of the employees who were allegedly threatened or interrogated, and, significantly, took place *long before* the Union obtained the majority status that the threats allegedly dissipated. Similarly, the arbitration "benefit" relied upon by the Board was granted *before* the Union obtained majority status. The alleged "threat" to close a plant consisted of a statement that the plant could be moved, and a move to a neighboring town was being considered for economic reasons that did, in fact, result in a transfer of operations a few months after the election, with no loss of jobs to any of the employees.* Hence, at the time of the Board's "scrutiny" it could not have affected any rerun election.

Ignoring all of this, the Board, in the most conclusory language, stated, "In our view there is little or no likelihood that a second and fair election could be conducted in the face of the Respondent's far-reaching unfair labor practices"

*Significantly, the transcript of the speech (at 453 of the Record) shows that there was no statement that the outcome of the election or employee support for the Union would have any effect on the decision to move.

(A-19). It is little wonder that the court of appeals took the Board to task for failing to explicate reasons to support its conclusions.

This case thus involves no question vital to the administration of the Act, or to the relationship between the Board and reviewing courts. The decision does not point to any conflict among the various courts of appeals, or any failure of the lower courts to follow the directives of this Court. Were those factors present, the decision most certainly would have been appealed by the Board itself. All that is involved is the failure of the Board in this case to address the considerations this Court in *Gissel* defined as important in fashioning a remedy once unfair labor practices are found.

The second "Question Presented" in the Petition again states an issue not really present in the decision. The court of appeals did not, as claimed by the Union, "ignore both the Board's expertise in the field of labor relations and the substantial evidence test by brushing aside the identifiable and specific portions of an employer's speech to employees relied upon by the Board. . . ." To the contrary, the court considered them carefully (A-3, A-5). What the court did do, however, was to apply the "substantial evidence" test correctly. That is, unlike the Board which relied upon out-of-context excerpts from the record, the court reviewed the record as a whole. The "substantial evidence" test requires deferral to the Board's expertise—but only if the Board's findings are supported by substantial evidence when the entire record is considered. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

The Petition relies wholly upon the Union's perceptions that the court failed to determine whether there

was substantial evidence to support the Board's finding, and that the court simply chose to agree with the conclusions of the ALJ, thereby undermining the expertise supposedly residing in the Board. Thus, the Union's Petition baldly asserts, "The Court never states that the Board's ruling is unsupported by substantial evidence, but merely chooses to 'agree with the Administrative Law Judge. . . .'" (Petition at 43-44). It is shocking that the Union could have ignored the court's explicit statement on this crucial point:

> We conclude, however, that the finding of the Board, in disagreement with the administrative law judge, that the company threatened to engage in sham bargaining is not supported by substantial evidence when the entire record is considered. (A-4).

It is obvious, therefore, that the substantial evidence rule was endorsed and followed by the court.

The third "Question Presented" deals with the issue of whether the court below should have remanded the case to the Board for consideration of whether a bargaining order was warranted in the absence of one of the §8(a)(1) violations found by the Board. Again, no important question is presented. There was no need for the court to remand the case to the Board for reconsideration of the remedy because the Board had already affirmed the ALJ's findings as to the effects and character of all of the unfair labor practices except for the alleged threat of sham bargaining. The Board did not disturb the ALJ's findings that the benefits allegedly promised were more illusory then real, that the employees were aware of the economic necessity of the plant closing, and that no one was actually hurt in his or her employment (A-61, 62). The timing of the violations found in relation to the attainment of the

alleged majority status was also apparent from the record. Thus, the court had before it findings of the Board, affirming the ALJ, that demonstrated that a bargaining order was not warranted, particularly since the effect of any violations would have quickly dissipated (A-8). In such circumstances, a remand would have been pointless and would only have delayed the ultimate resolution of the case. *First Lakewood Associates v. N.L.R.B.*, 582 F.2d 416, 423-24 (7th Cir. 1978); *N.L.R.B. v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978).

II. THE DECISION BELOW WAS CORRECT IN DENYING ENFORCEMENT OF THE BARGAINING ORDER

As already noted, the Board failed to consider certain key factors in determining whether the unfair labor practices found by it justified a bargaining order. As *Gissel* held, usually when unfair labor practices have been committed during an election campaign, the Board's usual remedies are sufficient and the extraordinary remedy of a bargaining order is not proper. Only in more extreme cases, where the possibility of a fair rerun election is slight, is a bargaining order based upon a dissipated card majority appropriate. The Board must state its basis for deciding which cases belong in which category, *Jamaica Towing, supra* at 1105. By doing so, the Board not only enables reviewing courts and litigants to understand its reasoning and provides guidance in a difficult area of labor relations law, it also protects the employees from an unwarranted imposition of a bargaining agent. *N.L.R.B. v. Armcor Industries, Inc.*, 535 F.2d 239, 245 (3rd Cir. 1976).

The Board did not explain its rationale in this case. As the court found, the evidence in support of many of the

alleged unfair labor practices was marginal. The card-based majority was narrow, and most of the campaign consisted of materials and communications that were perfectly proper. The Company had never before been found to have committed any unfair labor practices, nor has it since been the subject of any complaint filed by the Board. There was no reason to believe at any time that the alleged unfair labor practices could not be remedied by a standard order, that once so remedied they or any others would be committed, or that a fair rerun election could not be held as well in 1975 as in 1980.

It is significant to note that it is the Union, and not the Board, that takes umbrage with the decision of the Court of Appeals. The Board is satisfied that the decision does not merit review by this Court (Addendum). It has taken immediate steps to implement the order of the court of appeals and has not voiced the first suggestion that this decision has crippled its ability to administer the federal labor laws.

CONCLUSION

None of the "Questions Presented" in the Petition is of sufficient import to justify consideration by this Court. The Court of Appeals for the Sixth Circuit did not apply a new rule on the time for assessing the impact of unfair labor practices on Board elections, nor did it disregard the substantial evidence test. It also had before it a sufficient basis on the Board's own findings to justify choosing not to remand on the remedy issue. The decision of the court below on the matters relevant to the Petition was correct, and the Board itself has not seen fit to initiate a request for review by this Court.

This is not a case that warrants the granting of a petition for a writ of certiorari.

Respectfully submitted,

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ADDENDUM

Letter, March 27, 1980, National Labor Relations Board to Counsel for Other Parties

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Re: Donn Products, Inc. and American Metals Corp.
Cases Nos. 8-CA-9464 and 8-RC-9998

Gentlemen:

This is to inform you that the Board has concluded not to seek certiorari in the above cases. If you have any questions on this matter, please contact me at the above number.

Very truly yours,

/s/ Peter M. Godenschwager
Peter M. Godenschwager
Acting Supervisory Compliance Officer

PMG:klv